IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISCELLANEOUS APPLICATION(MAIN) NO. 12 OF 2007

Mrs. Nicaela Diniz
Della Nikita Enterprises
Behind Saraswati Mandir
Tisk, Ponda, Goa. **... Applicant**

versus

1. **M/s Wibro Construction Co.**
   Proprietory concerned of
   Mr. K. Abdulla
   Cardoso Building, 'C' Block
   Near KTC Bus Stand
   Panaji, Goa.

2. **State of Goa**
   Through Public Prosecutor **... Respondents**

Mr. Joseph Vaz, Advocate for the Applicant.

Ms. Winnie Coutinho, Public Prosecutor for the Respondent No.2.

Mr. Arun Bras De Sa, Advocate for the Respondent No.1.

CORAM : N. A. BRITTO, J.

DATE : 28TH FEBRUARY, 2007.

ORAL ORDER

Heard the learned Counsel on behalf of both the parties.

2. The applicant herein has invoked the extraordinary jurisdiction of this Court under Section 482 of the Code(Code of Criminal Procedure, 1973) to assail the Order dated 16-6-2006 of the learned J.M.F.C. by which the applicant has been made as an accused party in the complaint filed by the complainant(respondent no.1) herein.

3. There is no dispute that as per the complainant it is the applicant-Mrs. Nicaela Diniz who had issued a cheque in the sum of Rs.41,58,593/- which on being presented was dishonoured. There is also no dispute that the complainant served upon the applicant- Mrs. Nicaela Diniz the statutory notice as required under Section 138 of the Negotiable Instruments Act, 1881 and the applicant-Mrs. Nicaela Diniz alias Deniz appears to have replied to the same through her Advocate. However, the complainant filed the complaint showing Mrs. Henry E. Diniz alias Deniz as an accused. It appears that the complainant took some time to effect service upon the aforesaid accused but it is Mr. Henry E. Diniz who was served with summons/notice and appeared before the trial Court on 23-2-2006 and executed a personal bond. There is no dispute that Mr. Henry E. Diniz alias Deniz is the son of the applicant-Mrs. Nicaela Diniz. The complainant who was present before the Court on 23-2-2006 took no objection to the appearance of Mr. Henry Diniz as an accused and it is only on the next date of hearing i.e. on 3-3-2006 that an application came to be filed on behalf of the complainant that the name of the accused i.e. Mrs. Henry E. Diniz alias Deniz be changed to Mrs. Nicaela Diniz alias Deniz. It was also stated in

the said application that process be issued against Mrs. Nicaela Diniz alias Deniz.

4. The learned Magistrate after placing reliance on the case reported in **Bhim Singh** v. **Kan Singh**(2004(2) DCR 158) and on an unreported decision of this Court dated 16-10-2004 in Criminal Miscellaneous Application No.60 of 2004(**Shri Waman Laxman Sawant** v. **Shri Ashok Anand Sawant and another**) came to the conclusion that he had inherent powers to correct the cause title and accordingly proceeded to implead the applicant-Mrs. Nicaela Diniz as an accused in place of Mrs. Henry E. Diniz alias Deniz.

5. The learned Counsel on behalf of the applicant submits that the order of the trial Court amounts to adding a new person to the cause title after 30 days of the accrual of cause of action and that would be in violation of Section 142(c) of the Act. The learned Counsel has placed reliance on the case of **Dilawar Singh** v. **Parvinder Singh**((2005) 12 SCC 709).

6. On the other hand, the learned Counsel on behalf of the complainant submits that the complaint was filed against Mrs. Henry E. Diniz alias Deniz and what was sought to be corrected was only a typographical error which the learned Magistrate could have corrected within his jurisdiction. The learned Counsel further submits that a bare reading of the cause title and in the

light of the statutory notice sent shows that it was an error which was apparent on the face of it and which was required to be corrected.

7. Admittedly, process was issued against Mrs. Henry E. Diniz alias Deniz and as already stated it appears that it is Mr. Henry E. Diniz alias Deniz, the son of the applicant who accepted the same and appeared before the trial Court on the first occasion. If process was issued against Mrs. Henry E. Diniz alias Deniz, there was no question of issuing the process again as sought by the complainant in his said application dated 3-3-2006.

8. In **Bhim Singh** v. **Kan Singh**(supra) the Court had allowed a cheque number to be corrected from 383326 to 343336 and the date from 8-1-2001 to 9-1-2001, mistakes could be said to be typographical in nature. In the case of **Shri Waman Laxman Sawant** v. **Shri Ashok Anand Sawant**(supra) what was allowed to be corrected is the name of A-1 from Nilesh Laxman Sawant to Vaman alias Nilesh Laxman Sawant. In **Dilawar Singh** v. **Parvinder Singh**(supra) Section 19 of the Prevention of Corruption Act, 1947 was held to be coming in the way of taking cognizance under Section 190 or 319 of the Code. In other words, what was held therein is that a Special Judge trying an offence under the Prevention of Corruption Act, 1947 could not summon another person and proceed against him in the purported exercise of power under Section 319 of the Code if no sanction has been granted by the appropriate authority for prosecution of such a person as the assistance of a sanction is a

sine qua non for taking cognizance of the offence qua that person.

9. In terms of Section 142(b) a complaint for prosecution under Section 138 of the Negotiable Instruments Act, 1881 has got to be filed within a period of one month of the date on which the cause of action arises under Clause(c) of the proviso to Section 138 i.e. upon the failure of the drawer of the cheque to make payment within a period of 15 days of the receipt of the notice sent to him.

10. A case is an authority for what it actually decides and not for what logically flows from it. In my view, the ratio in the first two cases was clearly inapplicable to the case at hand. It can be seen from the complaint filed that initially the name of the accused typed is Mr. Henry E. Diniz alias Deniz which was converted by adding a 's' into Mrs. Henry E. Diniz alias Deniz, who as already stated is the son of the applicant-Mrs. Nicaela Diniz. Presumably since there was none as Mrs. Henry E. Diniz alias Deniz that the summons or notice came to be received by Mr. Henry E. Diniz alias Deniz who is the son of the applicant-Mrs. Nicaela Diniz. It is not the case of the complainant that Mrs. Henry E. Diniz alias Deniz and the applicant-Mrs. Nicaela Diniz are one and the same persons. If there was a Mrs. Henry E. Diniz alias Deniz it might have referred to the wife of the said Mr. Henry E. Diniz alias Deniz and could have never referred to the mother i.e. the applicant-Mrs. Nicaela Diniz. This was not a case of correcting a name of an accused by way of typographical error but substituting one accused by another and that obviously could not have been

done by the learned Magistrate for he had no powers to do so under the Code i.e. to substitute one accused by another. As stated in **Shri Waman L. Sawant** v. **Shri Ashok Anand Sawant**(supra) Courts do have certain incidental powers which are very necessary for their very survival and existence but such power cannot extend to change one accused to another and that too in violation of Section 142(b) of the Act.

11. In view of the above, the application deserves to succeed. The Order dated 16-6-2006 is hereby set aside and consequently the complaint hasl got to be dismissed as having been filed against a wrong person. The complainant is always at liberty, if law otherwise permits, to prosecute the applicant i.e. Mrs-Nicaela Diniz.

N. A. BRITTO, J.

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